APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JULY 11, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-2112

ISIDRO GOMEZ; LINDA L. GOMEZ, Wife,

Plaintiffs-Appellees,

v.

W.J. ATKINS, in his official and individual capacity,

Defendant-Appellant,

and

EARL MOOSE BUTLER, Sheriff of Cumberland County, in his official and individual capacity; H.R. COLLINS, in his official and individual capacity; JERRY D. WEBSTER, in his individual capacity; WESTERN SURETY COMPANY; DEBRA KOENIG,

Defendants.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-99-611-5-BR)

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Argued: April 2, 2002

Decided: July 11, 2002

Before WILKINSON, Chief Judge, KING, Circuit Judge, and HAMILTON, Senior Circuit Judge.

OPINION

KING, Circuit Judge.

Appellee Isidro Gomez ("Isidro") initiated this proceeding in the Eastern District of North Carolina under the provisions of 42 U.S.C. § 1983. He contended that Sergeant W.J. Atkins of the Cumberland County Sheriff's Department (the "Sheriff's Department") violated his constitutional rights by causing him to be charged and arrested, without probable cause, for the murder of his wife. He also asserted various related state law claims. Sergeant Atkins sought summary judgment in the district court, claiming qualified immunity. When the court declined to recognize his immunity claim, he filed this interlocutory appeal. As explained below, we vacate and remand for dismissal.

I.

In July 1980, Rickie Jean Gomez, Isidro's first wife, was murdered in Fayetteville, North Carolina.[1] In the latter half of 1980, the Sheriff's Department conducted a lengthy

1. In the record, Mrs. Gomez's name is spelled as either "Rickie" or "Ricki." Following the example of the parties and the district court, we utilize "Rickie," except when the alternative is present in quotations.

investigation of the crime, but it bore no fruit and lapsed into inactivity (the "Initial Investigation"). The investigation of the unsolved homicide was resurrected in 1995, and a follow-up investigation (the "Follow-up") was conducted under the auspices of Sergeant Atkins. A few months later, in May 1996, Isidro, who had re-married in 1981, was charged with the murder of his first wife. Following proceedings in the Cumberland County District Court, Isidro was indicted for first degree murder. The indictment was subsequently dismissed, and this civil litigation ensued. The factual predicate for these proceedings is explained more fully below.

A.

In its Initial Investigation, the Sheriff's Department learned that Rickie Jean had married Isidro in 1968 and that the couple made their home in Fayetteville. By 1979, Isidro and Rickie Jean were experiencing marital problems and they were, at times, living separately. In July 1980, Isidro sought a reconciliation, and they met at her sister's home in Atlanta, Georgia, on Friday, July 11, 1980. At the end of the weekend, on July 13, 1980, Isidro and Rickie Jean departed Atlanta on their return to Fayetteville. After travelling only seven or eight miles, Isidro's vehicle broke down. Because the necessary repair parts were unavailable, Isidro asked a friend, James Horton, to pick them up and tow the car to Horton's home in an Atlanta suburb. Horton and his wife then invited the couple to spend the night, but Rickie Jean declined because she was scheduled to work in Fayetteville the next day. Thus, after dinner, Isidro and Horton transported Rickie Jean to the Atlanta airport, and she returned to Fayetteville by plane. Isidro spent Sunday evening in Georgia with the Hortons.

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On Monday morning, July 14, 1980, Horton's wife took Isidro to obtain parts for the repair of his car. Isidro then made the necessary repairs and, between 10:00 and 10:30 a.m., he departed for Fayetteville. The distance between the Hortons' home near Atlanta and the Gomez home in Fayetteville is approximately 376 miles. At about 6:20 p.m., Rickie Jean's supervisor at Piedmont Airlines (her employer), called Isidro at the Gomez home, advising him that, although Rickie Jean had arrived in Fayetteville on a Sunday-evening flight, she had not reported for work Monday morning.

Around 7:00 p.m. on July 14, 1980, after consulting with a neighbor, Isidro called the local police and reported that Rickie Jean was missing. Law enforcement officers arrived at the Gomez home a few minutes later, and a crime scene investigation was conducted. There were no signs of robbery or forced entry into the home, but the investigators discovered blood in and around the master bedroom, a large blood stain on the underside of the mattress, and bloody shoe prints in the driveway. Upon removing the blood-soaked mattress from the bedroom, investigators noticed that Isidro was not distraught, and that he seemed unconcerned that his wife was missing and possibly dead. That evening, Isidro went to the County Law Enforcement Center to be interviewed.

At approximately 10:20 the next morning, July 15, 1980, deputies located Rickie Jean's car, with her dead body inside, in a wooded area about a mile from the Gomez home. She was wearing a nightgown, and the investigators found bed linen from the master bedroom in her car. An autopsy revealed that Rickie Jean had been badly beaten and stabbed in the chest. The time of her death was established as being

six to thirty-six hours prior to the discovery of her body, i.e., between 10:00 p.m. on Sunday, July 13, and 4:00 a.m. on Tuesday, July 15, 1980.

During the Initial Investigation, Isidro provided the Sheriff's Department with blood and hair samples. Tests on the evidence found at the Gomez home revealed the presence of both Types O and A blood, the types of Rickie Jean and Isidro, respectively. Blood found under Rickie Jean's fingernails was the same type as Isidro's. Loose hairs found on Rickie Jean's body were "microscopically consistent" with Isidro's hair. Investigators also discovered that Rickie Jean had advised several of her friends that Isidro had previously subjected her to physical abuse and beatings, and that he had threatened to kill her.

Throughout his interviews with the Sheriff's Department, Isidro maintained that he had not arrived home in Fayetteville until 6:00 p.m. on July 14, 1980, and that Rickie Jean's car was not there when he arrived. Shortly thereafter, according to Isidro, he noticed small blood stains in the house. After receiving a phone call from Rickie Jean's supervisor, Isidro called friends and relatives in an effort to locate Rickie Jean. Then, upon going outside to the driveway, he first noticed a large brownish stain which turned out to be blood. Isidro denied that he was involved in the death of Rickie Jean, maintaining that it was impossible for him to have returned from Atlanta in time to commit the murder and dispose of her body. On July 18, 1980, Isidro was subjected to a polygraph examination on the matter, which he failed.

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After the Initial Investigation, no charges were brought in connection with the murder of Rickie Jean. In May 1981, ten months after the murder, Isidro married his current wife and, because of a job transfer, moved to Michigan. Due to subsequent transfers, Isidro and his new wife, Linda, moved to Kentucky and finally to Virginia. All the while, the homicide investigation of Rickie Jean's death remained pending and unsolved in the Sheriff's Department.

B.

In 1994, fourteen years after the murder of Rickie Jean, Earl "Moose" Butler was elected Sheriff of Cumberland County. After taking office, Sheriff Butler directed Sergeant Atkins to review the County's unsolved homicide cases, including that of Rickie Jean. In November 1995, after reviewing the file on the Initial Investigation, Atkins travelled to Virginia and interviewed Isidro. Isidro relayed to Atkins essentially the same version of events he had provided the Sheriff's Department in 1980. Over the next six months, Atkins also interviewed relatives, friends, and co-workers of Rickie Jean, both in person and by phone. In all, he obtained the oral and written statements of at least seventeen persons. Numerous individuals advised Atkins that Rickie Jean claimed that Isidro had physically abused her, and that he had threatened to kill her. For example, Sabrina Ross, a friend of Rickie Jean, reported to Atkins that on one occasion Isidro "had choked [Rickie Jean], threw her on the floor and slapped her in the face," and that in a separate incident he "threw her against the wall and caused her to [miscarry] their first child." Ross also stated that Isidro repeatedly told Rickie Jean that he would kill her. Another

witness informed Atkins about seeing bruises "around [Rickie Jean's] neck, her ribs, arms, and on her back." Additionally, her friends informed Atkins that Rickie Jean and Isidro were each engaged in extramarital love affairs. According to a person who spoke with Rickie Jean the night before she left to meet Isidro in Atlanta, she was planning to tell him about a romantic relationship with another man. Atkins also learned that Rickie Jean and Isidro were engaged in a dispute over the custody of their two children. And one witness informed Atkins that Isidro had said "he would kill [Rickie Jean] before she got the kids."

In April 1996, at Atkins's request, Isidro provided new blood and hair samples to the Sheriff's Department, and it conducted DNA testing. The Laboratory Corporation of America ("LabCorp") then compared the DNA material found under Rickie Jean's nails with Isidro's DNA profile, but the results failed to inculpate Isidro (the "LabCorp DNA Report").

C.

Based on both the Initial Investigation and the Follow-up conducted in 1995 and 1996, Sergeant Atkins then drafted a six-page Statement of Investigating Officer in Detail (the "Report"), which purported to summarize the facts surrounding the death of Rickie Jean and the evidence pointing to Isidro as the culprit. The Report stated that loose hairs found on Rickie Jean were consistent with Isidro's body hair, and that blood found under Rickie Jean's fingernails was of the same type as Isidro's. After noting Isidro's contention that he did not return to Fayetteville until 6:00 p.m.

on July 14, 1980, the Report observed that Isidro could have arrived earlier without exceeding the speed limit. Additionally, the Report recounted that Isidro and Rickie Jean were each engaged in extramarital affairs, and that there was an ongoing dispute between them over the custody of their children. Finally, it observed that Isidro failed to show remorse over his wife's death, and that he had failed the polygraph examination relating to the investigation.[2]

On May 14, 1996, Sergeant Atkins met with his supervisors and the legal advisor for the Sheriff's Department (attorney Deborah Koenig), for the purpose of discussing the homicide investigation and how he should proceed with it.[3] Atkins reviewed with them the evidence from the Initial Investigation and the additional evidence acquired in the Follow-up. He had concluded that there was sufficient evidence to charge Isidro with the murder of Rickie Jean, and his supervising officers and the legal advisor agreed.

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2. Sergeant Atkins's Report also contained at least three material inaccuracies. First, it stated that Isidro's shoe size was the same as that found in a bloody footprint in the driveway at the crime scene. Second, it asserted that witnesses had spoken with Isidro in Fayetteville at 3:00 on Monday afternoon, when the witness statements from the Initial Investigation indicated that the first such conversation occurred at 6:20 p.m. Third, relying on statements of officers who had travelled from Atlanta to Fayetteville, the Report stated that the drive could be completed in four-and-a-half to five hours without exceeding the speed limit, when in fact the trip would take approximately seven hours without speeding.

3. Sheriff Butler was not present at the meeting, but the Chief Deputy, Chief Detective, and other supervising officers from the Sheriff's Department attended.

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Before seeking an arrest warrant for Isidro, Sergeant Atkins prepared an affidavit, in which he stated that "based upon the original investigation in 1980 and upon the continuing investigation from 1995 to 1996," Isidro "caused the death of his wife Ricki Jean Gomez." Prior to executing his affidavit, Atkins reviewed its contents with attorney Koenig, who responded that "it look[s] good to me." Atkins then presented the affidavit to a magistrate in the Cumberland County District Court, seeking issuance of an arrest warrant. The magistrate, on May 14, 1996, issued a murder warrant for Isidro, based on the "information furnished under oath," and Isidro was arrested at his home in Chesterfield, Virginia. He was then transported to Cumberland County, and on May 24, 1996, he was released on bond.

D.

After being arrested for the murder of his wife, Isidro retained lawyer Bobby Deaver of Fayetteville as his counsel. At a two-day probable-cause hearing conducted in the district court in September 1996, the issue of probable cause was litigated.[4] In support thereof, the prosecution presented the testimony of six witnesses, photographs of the blood evidence found in the driveway and master bedroom of the Gomez home, as well as the autopsy report and its accompanying photographs. One of the two testifying law officers read

4. The conduct of a probable-cause hearing in North Carolina is governed by N.C. Gen. Stat. § 15A-606(a). The purpose of such a hearing is "to determine whether the accused should be discharged or whether sufficient probable cause exists to bind the case over to superior court and to seek an indictment against the defendant." *State v. Sellars*, 278 S.E.2d 907, 913 (N.C. Ct. App. 1981).

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Isidro's July 15, 1980, statement into the record, spelling out Isidro's version of the events. During the hearing, attorney Deaver cross-examined the State's witnesses and, in response to the State's case, he presented evidence on behalf of Isidro, consisting of a statement by an alibi witness and the exculpatory LabCorp DNA Report. At the conclusion of the hearing, on September 27, 1996, the district court found "there is probable cause to believe that Ricki Jean Gomez was murdered on or about the 14th day of July, 1980, and that there is probable cause to believe that the defendant, Isidro Gomez, committed that offense of murder in the first degree." The next month, the district attorney sought, and the grand jury returned, a single-count indictment against Isidro, charging him with first degree murder in the death of Rickie Jean.

Following the indictment, while Isidro was on bond, the State's position on his case changed. In October 1996, LabCorp conducted additional DNA tests on fingernail scrapings from Rickie Jean, and it was determined that Isidro was "excluded as a possible contributor to the genetic material in this sample." Thereafter, the Sheriff's Department submitted Isidro's hair sample and loose hairs found on Rickie Jean's body to the FBI Laboratory. In its Report of September 30, 1997, the FBI determined that the hairs examined and compared were microscopically dissimilar, and it also concluded that some of the loose hairs on Rickie Jean's body, initially believed to belong to Isidro, were carpet fiber. Faced with the burden of proving Isidro's guilt beyond a reasonable doubt, the district attorney concluded that there was "insufficient evidence to continue the prosecution" and, on January 13, 1998, he dismissed the indictment. No further charges have been preferred.

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E.

On September 10, 1999, Isidro and Linda Gomez filed this § 1983 suit against Sergeant Atkins, Sheriff Butler, and certain other officers, in both their official and individual capacities.[5] Their Complaint alleged, inter alia, that Atkins and Butler had violated Isidro's Fourth Amendment right to be free from unreasonable seizure. Isidro's present wife, Linda Gomez, sought damages for loss of consortium.

On November 17, 2000, Sergeant Atkins and Sheriff Butler filed a joint motion for summary judgment, maintaining that they were entitled to qualified immunity for their actions in the investigation and arrest of Isidro. Conversely, Isidro asserted that qualified immunity was inappropriate because, after considering his alibi and correcting the errors in Atkins's Report, no reasonable officer could believe there was probable cause to arrest him. On December 27, 2000, Isidro dismissed all the claims against Butler in his individual capacity, rendering Butler's claim of qualified immunity moot. On August 27, 2001, the district court issued

5. In addition to Sergeant Atkins and Sheriff Butler, the Complaint named the following as defendants: Detective Sheriff H.R. Collins of the Cumberland County Sheriff's Department, Jerry D. Webster of the North Carolina State Bureau of Investigation, and Western Surety Company. An Amended Complaint, filed July 17, 2000, named Ms. Koenig, the legal advisor, as a defendant. The plaintiffs thereafter dismissed Collins, Webster, and Koenig. They did not sue the district attorney, the magistrate, the district court judge, or the grand jury. *See Wadkins v. Arnold*, 214 F.3d 535, 538 n.5 (4th Cir. 2000) (explaining that judicial officers acting in their judicial capacities and prosecutors authorizing prosecution are protected by absolute immunity).

its Order denying Atkins's qualified immunity claim. *Gomez v. Butler*, Order, No. 5:99-CV-611-BR(2) (E.D.N.C. Aug. 27, 2001) (the "Order"). The court concluded, inter alia, that the evidence was insufficient to establish probable cause to charge Isidro and that "a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances." *Id.* at 17. Atkins then appealed to this Court from the denial of his immunity claim, and, on September 20, 2001, the district court proceedings were stayed pending our review of his claim. We possess jurisdiction pursuant to the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Wadkins v. Arnold*, 214 F.3d 535, 536 n.1 (4th Cir. 2000).

II.

We review de novo a district court's denial of qualified immunity. As a general proposition, in assessing a qualified immunity claim, a court must view the facts in the light most favorable to the party asserting the injury. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). As such, to the extent that there is a factual dispute concerning what Sergeant Atkins knew after conducting his Follow-up investigation, we must resolve any such dispute in the light most favorable to Isidro. However, to the extent that Atkins decided to discount certain conflicting evidence, such as Isidro's alibi, we need not accept such discounted evidence in the light most favorable to him. Were we compelled to accept an alibi that a law officer has declined to credit, the officer could never be deemed to have acted reasonably, and we would eliminate any possibility of qualified immunity in a § 1983 case. Instead, as we explain more fully below, to the extent that Atkins discounted Isidro's

alibi or interpreted certain evidence, our review must assess whether, in so doing, he acted in an objectively reasonable manner, i.e., whether an objective officer could have reasonably believed there was probable cause for an arrest. *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991).

III.

A.

Public officials engaged in the performance of discretionary functions are entitled to qualified immunity from civil liability to the extent "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Trulock v. Freeh*, 275 F.3d 391, 399 (4th Cir. 2001). The Supreme Court has recognized that such immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In particular, as we have spelled out with specificity, qualified immunity protects law officers from "bad guesses in gray areas," and it ensures that they may be held personally liable only "for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

In an appeal from the denial of a qualified immunity claim, our first task is to ascertain whether the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Clem v. Corbeau*, 284 F.3d 543, 549 (4th Cir. 2002). If the answer to this inquiry is "no," the analysis ends and the plaintiff cannot prevail.

If the answer is "yes," we must then consider whether, at the time of the violation, the constitutional right was clearly established, that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 201-02; *see also Taylor v. Waters*, 81 F.3d 429, 433 (4th Cir. 1996) (quoting *Gordon v. Kidd*, 971 F.2d 1087, 1093 (4th Cir. 1992)).

B.

The § 1983 claim being pursued by Isidro is, in substance, that Sergeant Atkins violated his Fourth Amendment right not to be arrested without probable cause. Isidro contends that, in seeking the arrest warrant, Atkins ignored exculpatory evidence and made false statements in support of the warrant application. Isidro maintains that Atkins sought the arrest warrant despite the fact that there were no indicia of probable cause, and he further maintains that Atkins's misstatements initiated the improper prosecution. In our assessment of whether Atkins is entitled to qualified immunity, however, the question is not whether there actually was probable cause for the murder warrant against Isidro, but whether an objective law officer could reasonably have believed probable cause to exist. *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991). As the Supreme Court stated in *Malley v. Briggs*, "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." (citations omitted). 475 U.S. at 344-45. In *Anderson v. Creighton*, the Court set forth the underlying rationale for this favorable standard, observing that "[i]t is inevitable that law enforcement officials will in some cases reasonably but

mistakenly conclude that probable cause is present, and . . . like other officials who act in ways they reasonably believe to be lawful[,] [they] should not be held personally liable." 483 U.S. 635, 641 (1987).

C.

In assessing whether probable cause existed when the murder warrant against Isidro was issued, we must "examine the totality of the circumstances known to the officer at the time of the arrest." *Taylor*, 81 F.3d at 434 (citing *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995)). We are guided in this endeavor by certain fundamental principles. First, the determination and existence of probable cause is a "practical, nontechnical conception," and it involves "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Furthermore, in determining whether probable cause exists, the evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

Probable cause will be found to exist when "the facts and circumstances within an officer's knowledge — or of which he possesses reasonably trustworthy information — are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed." *Wadkins v. Arnold*, 214 F.3d 535, 539 (4th Cir. 2000) (citing *Brinegar*, 338 U.S. at 175-76). While probable cause demands "more than a mere suspicion, . . . evidence sufficient to convict is not required." *Taylor*, 81 F.3d at 434 (citing

Wong Sun v. United States, 371 U.S. 471, 479 (1963)). And reasonable law officers need not "resolve every doubt about a suspect's guilt before probable cause is established." *Torchinsky*, 942 F.2d at 264 (citation omitted). While officers "may not disregard readily available exculpatory evidence . . . the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause." *Wadkins*, 214 F.3d at 541.

IV.

In order for Sergeant Atkins to successfully claim qualified immunity in this case, the information within his knowledge at the time of the warrant application had to justify a reasonable belief that Isidro probably caused the death of Rickie Jean. Contrary to the conclusion of the district court, our assessment of the information connecting Isidro to the crime compels the view that the warrant application was not "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986). In the circumstances of the case, Atkins did not transgress any bright lines, *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), and to the extent he made mistakes, they are entirely insufficient to render him liable to a § 1983 action. *Torchinsky v. Siwinski*, 942 F.2d 257, 261 (4th Cir. 1991). Our analysis of the record here leads us inexorably to this conclusion. Isidro possessed a strong motive to harm or kill Rickie Jean; he had the opportunity to commit the crime; he was linked to the murder by physical evidence; and Atkins was entitled to disbelieve his alibi. From a procedural standpoint, Atkins acted in a prudent manner, and his view of the probable cause question passed muster in state court. We explain our analysis more fully below.

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A.

1.

First, both the Initial Investigation and the Follow-up revealed that Isidro possessed a strong motive to injure Rickie Jean, and that he had made prior threats to both harm and kill her. *See Matter of Extradition of Kraiselburd*, 786 F.2d 1395, 1399 (9th Cir. 1986) (stating that "evidence of appellant's motive and threats amply supports a finding of probable cause"). Friends of Rickie Jean had informed Sergeant Atkins that both she and Isidro were engaged in extramarital affairs. According to a witness who spoke with Rickie Jean the night before she met Isidro in Atlanta, "she was going to tell [Isidro] about her relationship with [another man]."

Additionally, the Initial Investigation revealed, and Sergeant Atkins was advised by several witnesses, that Isidro had repeatedly physically abused and threatened to kill Rickie Jean. Isidro and Rickie Jean were engaged in violent disputes over who should have custody of their children, and Isidro had said "he would kill [Rickie Jean] before she got the kids." As those "versed in the field of law enforcement" well know, *see Illinois v. Gates*, 462 U.S. 213, 232 (1983), it is common for death threats to be made in domestic violence matters. Unfortunately, they are too often carried out, resulting in serious injury and death.

2.

Second, based on the information in the hands of Sergeant Atkins, Isidro possessed an ample opportunity to commit the

brutal murder of his wife. He had departed from Atlanta as early as 10:00 a.m. on July 14, 1980, and the police did not arrive at the Gomez home until after 7:00 that evening. Isidro thus had a nine-hour window, before calling the authorities, within which to travel from Atlanta to Fayetteville, kill his wife, and then dispose of her body. Indeed, he admits being at the murder scene by 6:00 p.m., at least an hour before he called the authorities.[6]

3.

Third, while it was not overly compelling, some of the available physical evidence linked Isidro to the crime. Although the LabCorp DNA Report concluded that material found under Rickie Jean's fingernails did not match Isidro's DNA profile, other blood evidence could be reasonably construed to connect Isidro to the crime. Rickie Jean had Type O blood, yet Type A blood (Isidro's type) was found in the master bedroom where she was murdered. More importantly, Type A blood was found under Rickie Jean's fingernails. And, at the time the warrant was issued, loose hairs found on Rickie Jean's body were determined to be microscopically consistent with Isidro's hair. Finally, investigators at the crime scene believed that Isidro had conducted himself in a strange manner, and that he had failed to express grief or remorse, despite the fact that his wife was missing and the evidence indicated that foul play had occurred.

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6. It is of additional significance that Rickie Jean was murdered in her own home, and that there were no signs of forced entry or robbery.

4.

Fourth, Sergeant Atkins was entitled to disbelieve Isidro's alibi. And to the extent that the alibi was deemed false, it was also reasonable for Atkins to view it as inculpatory. *See United States v. Mojica-Baez*, 229 F.3d 292, 306 (1st Cir. 2000) (explaining that "false alibi was itself evidence of guilt"). In both 1980 and 1995, Isidro claimed that he drove no faster than the speed limit from Atlanta to Fayetteville, and that he did not arrive home until 6:00 p.m. on July 14. Thus, Isidro maintained that he did not have a sufficient opportunity to murder Rickie Jean and move her body before the authorities arrived in response to his 7:00 p.m. phone call. A reasonable officer, however, was not obliged to credit Isidro's exculpatory story. For example, if Isidro departed Atlanta at 10:00 a.m., and if he averaged sixty-five miles per hour, he could have stopped for fuel and still arrived in Fayetteville by 4:00 p.m.[7] Thus, Isidro could reasonably be placed at his home more than two hours before he claims to have arrived. And, although such results are generally not admissible in a criminal trial, Isidro had failed a polygraph examination in connection with his version of events.[8] Thus,

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7. In order to drive from Atlanta to Fayetteville, Isidro took Interstate 20 East to Florence, South Carolina, and then proceeded North on Interstate 95, a distance of approximately 376 miles. If he drove at the then fifty-five mile per hour speed limit, the trip would have taken about seven hours, placing him in Fayetteville as early as 5:00 p.m. If he averaged seventy miles per hour, however, he would have completed the trip in less than five-and-a-half hours, and he would have been home in Fayetteville prior to 3:30 p.m.

8. While polygraph results are generally not admissible at trial, such tests are a well-recognized law enforcement technique, and a

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an objectively reasonable officer was entitled to conclude that Isidro was providing the authorities with a false alibi.

B.

It is important to our analysis that Sergeant Atkins conducted himself, from a procedural standpoint, in a prudent and deliberate manner. After carrying out his Follow-up investigation, he drafted a written Report and, before seeking judicial action against Isidro, he presented the case to his supervisors and the legal advisor of the Sheriff's Department. After receiving their supportive opinions, he provided his proposed affidavit to the Department's legal advisor for her review. It was only after following these "in-house" review procedures that Atkins presented the affidavit to the magistrate and sought the issuance of a murder warrant against Isidro. *See Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2000) (recognizing that officer's "conference with the Commonwealth's Attorney and the subsequent issuance of the warrants by a neutral and detached magistrate weigh heavily toward a finding that [officer] is immune").

In our assessment of objective reasonableness, it is also significant that Atkins arrested Isidro only after first seeking and procuring the approval of a detached district court magistrate. This was the proper course of action on his part. As Chief Judge Wilkinson astutely observed in our *Torchinsky*

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reasonable officer might take their results into account in assessing probable cause. *See United States v. Trenkler*, 61 F.3d 45, 58 (1st Cir. 1995) (recognizing that law enforcement officers rely on polygraph examinations even though they are generally not admissible).

decision, while the issuance of an arrest warrant does not provide per se evidence of objective reasonableness, a law officer's "actions in seeking [an] arrest warrant[ ] and the magistrate's determination of probable cause provide additional support for his claim that he acted with objective reasonableness." *Torchinsky*, 942 F.2d at 262.

C.

Finally, and perhaps of most significance to our assessment of Sergeant Atkins's qualified immunity claim, we must take account of the comprehensive probable-cause hearing conducted on the murder charge made against Isidro. During the two-day hearing in September 1996, the district court judge heard and evaluated the testimony of the State's six witnesses, all of whom were cross-examined by Isidro's retained counsel. One of the witnesses read Isidro's July 15, 1980, statement, containing his version of the events, to the judge. During the hearing, the prosecution presented photographic and medical evidence relating to the crime, and Isidro's counsel countered with an alibi statement and the exculpatory LabCorp DNA Report. After reviewing and considering this evidence and the argument of counsel, the judge reached the same conclusion as had the magistrate, finding "that there is probable cause to believe that the defendant, Isidro Gomez, committed that offense of murder in the first degree," and the court bound Isidro over for grand jury proceedings. And following the court's probable-cause ruling in favor of the prosecution, the district attorney successfully secured an indictment from the Cumberland County grand jury, charging Isidro with the first degree murder of Rickie Jean Gomez.

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The district court, in denying Sergeant Atkins's qualified immunity claim, placed substantial reliance on the errors found in his Report, *see supra* note 2, and it emphasized the potential that those with whom Atkins dealt may have been misled by the Report.[9] Order at 12-13. The probable-cause hearing, however, afforded Isidro a full opportunity to litigate, in an adversary proceeding before an impartial judge, the issue of probable cause. After the State presented its evidence, and after Isidro's counsel cross-examined the witnesses and introduced exculpatory evidence, the district court judge (who, not having reviewed the Report, could not have been influenced by any errors therein) found probable cause for the murder charge.

The Supreme Court, in *Malley v. Briggs*, emphasized that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." 475 U.S. 335, 341 (1986). In this case, Isidro has failed to forecast any evidence establishing that the Report was intentionally falsified by Sergeant Atkins. As we explained in *Torchinsky*, "[i]f reasonable mistakes were actionable, difficult questions of discretion would always be resolved in favor of inaction, and effective law enforcement would be lost." 942 F.2d at 261. The conduct complained of here fails to demonstrate either incompetence

9. According to Sergeant Atkins, he provided his Report to the magistrate, along with his affidavit, in seeking the arrest warrant. The Report was unsworn, however, and in issuing the warrant the magistrate relied only on information "furnished under oath." Nothing in the record indicates that the district court judge had access to or reviewed the Report prior to his finding of probable cause.

or a knowing violation of the law and, in these circumstances, Atkins's immunity claim must be recognized.[10]

V.

Pursuant to the foregoing, we vacate the Order of the district court, and we remand for dismissal.

VACATED AND REMANDED.

10. Atkins also asserts that Isidro is collaterally estopped from asserting that there was no probable cause for his arrest, because that issue was fully litigated in the probable-cause hearing before the Cumberland County District Court. Because Atkins is entitled to qualified immunity, we need not address his collateral estoppel contention.

Appendix A

HAMILTON, Senior Circuit Judge, concurring:

For the reasons expressed by the court today, I agree with the court that Sergeant Atkins is entitled to qualified immunity because, notwithstanding the factual inaccuracies in Sergeant Atkins' report, an objective law enforcement officer reasonably could have believed that probable cause existed for the arrest of Isidro. Therefore, I join the court's opinion.

I write separately only to express my disdain for Sergeant Atkins' inclusion of the material factual inaccuracies, described in Footnote 2 of the court's opinion, in his report. These material factual inaccuracies, which dealt with the heart of the State's case, *i.e.*, whether Isidro murdered his first wife, should not have been in Sergeant Atkins' report. While the presence of these material factual inaccuracies in the report do not prevent Sergeant Atkins from invoking qualified immunity, it is nevertheless a disturbing commentary on the manner in which law enforcement activities are conducted in Cumberland County, North Carolina.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION DATED AUGUST 27, 2001 AND FILED AUGUST 28, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:99-CV-611-BR(2)

ISIDRO GOMEZ and wife, LINDA L. GOMEZ,

Plaintiffs,

v.

EARL BUTLER, Sheriff of Cumberland County, in his official capacity, W.J. ATKINS, in his official and individual capacity, and WESTERN SURETY COMPANY, a bonding company licensed to conduct business in North Carolina,

Defendants.

ORDER

This matter comes before the court on the joint motion for summary judgment filed by defendants Sheriff Earl Butler and W.J. Atkins. Plaintiffs have filed a response and defendants have filed their respective replies. Also before the court is defendants' joint motion for leave to file the affidavit of Cuyler

L. Windham and plaintiffs' motion to strike the same. These motions have also been fully briefed. These matters are ripe for disposition.

I. INTRODUCTION

This is an action for compensatory and punitive damages brought pursuant to the provisions of 42 U.S.C. § 1983 and based upon the alleged wrongful arrest and prosecution of plaintiff Isidro Gomez for the murder of his wife Rickie Jean Gomez thereby resulting in a violation of his rights under the United States Constitution. Plaintiff Isidro Gomez also asserts state law claims of civil conspiracy, abuse of process, malicious prosecution, and intentional and negligent infliction of emotional distress arising out of the same conduct and occurrences. In addition, plaintiff Linda Gomez, Isidro's current wife, seeks compensatory damages for loss of consortium. While plaintiffs' complaint has previously named other defendants,[1] at the time of this order, the only remaining defendants include Sheriff Earl Butler, in his official capacity, W.J. Atkins, in both his official and individual capacity, and Western Surety Company.

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1. At the time of this order, plaintiffs had voluntarily dismissed defendants Collins, Webster, and Koenig and all claims against Sheriff Butler in his individual capacity.

Appendix B

II. BACKGROUND

A. Isidro and Rickie Jean Gomez[2]

Isidro and Rickie Jean were married in September 1968. (I. Gomez Aff. ¶ 3 — AP4790.[3]) Two sons were born of the marriage in 1969 and 1976. (*Id.*) Sometime in the late 1970's, Isidro and Rickie Jean began experiencing problems with their marriage and, by June of 1980, they had been living separately for approximately a year and a half. (*Id.* ¶ 5 — AP4791.) During this separation, Isidro had custody of the children. (*Id.* ¶ 7 - AP4791.)

B. Weekend in Atlanta

In June of 1980, Rickie Jean suggested that Isidro take the boys to Texas to spend the summer with Isidro's family so that the two of them could have time to work on their marriage. (*Id.* ¶ 8 — AP4791.) Sometime around the end of June, Isidro drove their sons to Texas. (I. Gomez Dep., Vol. III, at 600 — AP3032; I. Gomez Aff. ¶ 9 — AP4791.) Rickie Jean was supposed to stay in the marital home while Isidro was in

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2. As two of the individuals in this case, Isidro and Rickie Jean Gomez, share the same last name, the court will refer to them by their first names for clarity.

3. With their motion, defendants fled an extensive appendix which contains copies of all notes, memoranda, reports, photographs, records, deposition transcripts and other exhibits. These materials have been sequentially paginated, and references to the pages numbers of these documents are designated as "AP __." For clarity, the court will use the same system for its citation to these materials.

Texas. (I. Gomez Aff. ¶ 8 — AP 4791.) Isidro called Rickie Jean from Texas and invited her to meet him in Atlanta at the home of Rickie Jean's sister and brother-in-law, Linda and Ron Hailey, so that they could discuss reconciliation. (*Id.* ¶ 10 — AP4791.) Rickie Jean agreed and they met in Atlanta on Friday, 11 July 1980. (*Id.* ¶ 10 — AP4791.) Isidro drove his car from Texas to Atlanta. (*Id.* ¶ 12 — AP4792.) Rickie Jean, who worked for Piedmont Airlines and could fly free, flew to Atlanta. (*Id.* ¶¶ 11, 13 — AP4792.)

Isidro and Rickie Jean spent the weekend in Atlanta with the Haileys. (*Id.* ¶ 14-15 — AP4792.) On Sunday, 13 July 1980, Isidro and Rickie Jean left Atlanta driving Isidro's 1979 Chevrolet Chevette to return to home to Fayetteville. (*Id.* ¶ 16 — AP4792.) However, approximately seven or eight miles into the trip, the crank shaft pulley sheared off and the car broke down. (*Id.*) Isidro called Rickie Jean's sister to come pick them up. (*Id.* ¶ 17 — AP4792.) He also called his friend, James Horton, who lived in the area, to see if Mr. Horton had a vehicle that could tow Isidro's car to a place where he could make the necessary repairs. (I. Gomez Dep., Vol. I, at 111-12 — AP2489-2490; I. Gomez Aff. ¶ 18 — AP4793.) Mr. Horton towed Isidro's car to the Horton's home in Ellenwood, Georgia, a suburb of Atlanta, where Isidro removed the broken crankshaft pulley. (I. Gomez Dep., Vol. 1, at 113 — AP2491; I. Gomez Aff. ¶¶ 18-19 — AP4792-4793.)

The parts that Isidro needed to fix the car could not be purchased until a Chevrolet dealership opened on Monday morning, so the Hortons invited Isidro and Rickie Jean to spend the night. (I. Gomez Aff. ¶¶ 19, 21 — AP4793.)

However, Rickie Jean was scheduled to work at 6:30 a.m. on Monday morning at Piedmont. (*Id.* ¶ 21 — AP4793; Huffman Interview Notes — AP1051.) At that time, Rickie Jean was a part-time employee with a desire to become a full-time employee and had never missed a day of work or even been late for a shift. (I. Gomez Dep., Vol. 1, at 117 — AP2495; Rogers Interview Notes — AP1057.) Consequently, Rickie Jean decided to fly back to Fayetteville that evening. (I. Gomez Aff. ¶ 21 — AP4793.) Isidro and Rickie Jean had dinner with the Hortons that Sunday evening, and, afterward, they dropped Rickie Jean off at the Atlanta airport. (*Id.* ¶ 22 — AP4794.)

C. Rickie Jean's Murder

Isidro spent Sunday night with the Hortons. (I. Gomez Aff. ¶ 24 — AP4794.) In the morning, Mrs. Horton took Isidro to the Chevrolet dealership where he purchased the parts for his car. (*Id.*) After making the repairs to his car, Isidro left for Fayetteville between 10:00 and 10:30 a.m., Monday, 14 July 1980. (*Id.*) Mrs. Horton and Sandra Gail Mills, the fiancée of the Horton's son, were at the house when Isidro departed. (*Id.*)

According to Isidro, he drove the 376 miles from Ellenwood Georgia, to Fayetteville, North Carolina, stopping once to get gas, have a snack, and stretch his legs. Isidro arrived at home at approximately 6:00 p.m. that evening. (I. Gomez Aff. ¶¶ 25-27 — AP4794; Ex. B — AP4810.) Isidro pulled into the left side of the driveway, as usual, and entered the house. (I. Gomez Aff. ¶ 29 — AP4795.) Rickie Jean was not at home. (*Id.*) Isidro proceeded to take a shower and drink a

beer. (*Id.*) At some point, he noticed a few small blood stains in the house. (*Id.*) One of the stains on the carpet at the foot of the bed appeared as though someone had attempted to clean it. (*Id.*)

Soon after he arrived home, Isidro received a phone call from David Rogers, Rickie Jean's supervisor at Piedmont. (I. Gomez Aff. ¶ 32 — AP4796.) Rogers asked Isidro if he knew where Rickie Jean was because she had not reported for work that morning. (*Id.*) During this conversation, Rogers confirmed that Rickie Jean had arrived in Fayetteville on a Piedmont flight on Sunday evening. (*Id.*; 1980 Rogers Interview Notes — AP1055.) After speaking with Rogers, Isidro called Rickie Jean's nieces and a friend of hers in an attempt to locate her. (I. Gomez Aff. ¶ 33 — AP4796.) Isidro then called a friend to see if he would ride out to the airport with Isidro to look for Rickie Jean's car. (*Id.* ¶ 34 — AP4796.) Isidro wrote a note to Rickie Jean in case she came home while he was out and went outside to wait for his friend. (I. Gomez Aff. ¶ 34 — AP4796.) While outside, Isidro then noticed a large brownish stain on the driveway on the passenger side of his car. (*Id.*) At this point, Isidro summoned his neighbor, Earl Usrey, to show him the stains. (*Id.* at ¶ 35 — AP4797.) Isidro asked Usrey what he should do and Usrey suggested that he call the police, which Isidro then did. (I. Gomez Aff. ¶ 36 — AP4797.)

The first deputy arrived at approximately 7:00 p.m. and, thereafter, a crime scene investigation was conducted. (I. Gomez Aff. ¶¶ 37-39 — AP4797-4798.) Isidro authorized the investigators to search the residence and remove any physical evidence they discovered. (*Id.*) During the crime

scene search, the investigators discovered blood on the door jamb leading into the master bedroom, on the floor of the master bedroom, on the inside of a lamp shade in the master bedroom, and on a sink in the master bath. (City-County Bureau of Identifcation Investigative Report — AP872; City-County Bureau of Identification Call Record — AP877.) Investigators also discovered a large blood stain on the underside of the mattress in the master bedroom and some shoe tracks in a stain in the driveway, which Isidro reported that he had not seen. (*Id.*)

After the house was searched, Isidro voluntarily went to the law enforcement center to be interviewed. (I. Gomez Aff. ¶ 41 — AP4798.) He had no cuts, bruises, or abrasions on his hands, face, arms, legs, or any other exposed part of his body. (*Id.*)

At approximately 10:20 a.m. the next morning, 15 July 1980, Rickie Jean's dead body was discovered in the back floorboard of her car, which was parked in a wooded area about a mile from the Gomez house. (I. Gomez Aff. ¶ 42 — AP4798; N.C. State Bureaus of Investigation Initial Report — AP739; City-County Bureau of Identification Call Record — AP874, AP878.) Rickie Jean was still in her nightgown. (*Id.*) Also in the car was the bed linen from the master bedroom. (City-County Bureau of Identification Call Record — AP874.) A second crime scene investigation was conducted and the technicians were able to lift latent fingerprints from the car. (City-County Bureau of Identification Investigative Report — AP874; City-County Bureau of Identification Call Record — AP878.)

Appendix B

An autopsy revealed that Rickie Jean had been beaten badly about the face and body, choked and stabbed to death. (Statement of Investigating Officer in Detail — AP855, ¶ 38; Report of Autopsy — AP893-898.) The fatal blow was a stab wound to the chest that punctured her heart and lungs. (Report of Autopsy — AP898.) The autopsy also revealed defensive wounds to the hands and arms. (Statement of Investigating Offcer in Detail — AP855, ¶ 39.) The estimated time of death was between 6 hours and 36 hours prior to the time of the discovery of the body, or between 10:20 p.m. Sunday, 13 July, 1980, and 4:20 a.m. on Tuesday, 15 July 1980. (Report of Autopsy — AP898.)

On 18 July 1980, three days after the discovery of Rickie Jean's body, Isidro voluntarily submitted to a polygraph examination. (I. Gomez Aff. ¶ 44 and Exhibit C attached thereto — AP4799, AP4811-4818.) The agent who administered the test, informed Isidro that he had failed the test. (*Id.*)

D. The Investigation of Isidro Gomez

In 1980-1981, Isidro was investigated as a suspect in the murder. However, following the investigation, Isidro was not arrested. Sometime in 1981, Isidro remarried and shortly thereafter moved to Michigan.

In 1994, Earl Ray Butler was elected Sheriff of Cumberland County. (Butler Dep., at 15, AP1665.) After taking office, Sheriff Butler appointed defendant Sergeant Atkins to review the files of old unsolved murder cases, which included the Rickie Jean Gomez case. (Atkins Dep., Ex. 43 — AP4873-4874.) Atkins began reviewing the file in late October or

early November 1995. (Atkins Dep., at 68, AP1491.) During this investigation, new blood samples were collected from Isidro such that DNA analysis, which was not conducted in 1980, could be performed. (I. Gomez Aff. ¶ 52 — AP4802.)

Isidro's blood sample, along with some reference samples of Rickie Jean's DNA and fingernail clippings, were sent to a private laboratory on 16 April 1996. (Atkins Dep., at 136-38, AP1559-1561; Clement Dep., Ex. I — AP1764; Ex. I — AP1871-1872.) A serology test of the nail clippings had revealed the presence of Type "A" blood under the nails in 1980. (State Bureau of Investigation Laboratory Report — AP879-880.) On 29 April 1996, the lab reported that the DNA profile obtained from the clippings was "consistent with the DNA profile" of Rickie Jean and "different than the DNA profile" of Isidro. (Clement Dep., Ex. I, AP1871-1872.)

E. The Arrest

On 14 May 1996, Atkins met with his supervisors[4] and Deborah Koenig, the attorney for the Sheriff's Department. (Atkins Dep., at 120 — AP 1542; Koenig Aff. ¶ 6 — AP4786.) After reviewing the evidence presented by Atkins in his "Statement of Investigating Officer in Detail," everyone in the meeting agreed that there was sufficient evidence to seek a warrant for Isidro's arrest. (Atkins Dep., at 130-32, 134-36 — AP1553-1555, AP1557-1559.) On that same day, Atkins applied for an arrest warrant. (Atkins Dep., at 119 — AP1542.) In support of the warrant application, Atkins presented to the magistrate an Affidavit and a working copy of his "Statement

4. Defendant Sheriff Butler did not participate in this meeting. (Atkins Dep., at 119-20 — AP1542-1543.)

of Investigating Officer in Detail." (Atkins Dep., at 153-54 — AP1576-1577.) The magistrate issued the warrant and Isidro was immediately arrested on 14 May 1996 in Virginia, where he was currently residing. (Warrant for Arrest — AP1362; I. Gomez Aff. ¶ 53 — AP4802.) Isidro was extradited to North Carolina on 24 May 1996. (*Id.*)

On 26 and 27 September 1996, a probable cause hearing was conducted, and the court determined that there was probable cause to support Isidro's arrest. (Transcript of Probable Cause Hearing — AP1172, AP1355.) Thereafter, a Cumberland County grand jury returned a true bill of indictment against Isidro. (I. Gomez Aff. ¶ 55 — AP4803.) On 12 January 1998, the eve of trial, a decision was made by the District Attorney to dismiss all charges against Isidro due to lack of evidence. (Dismissal and Notice of Reinstatement and Memorandum attached thereto — AP1374-1375.) Additional facts will be introduced as needed for discussion.

III. MOTION TO STRIKE

The court first turns to plaintiffs' motion to strike the affidavit of Cuyler Windham and defendants' motion for leave to file the same. This affidavit was submitted by defendants in conjunction with their reply briefs in support of their motions for summary judgment. Plaintiffs assert that the court should strike this affidavit as untimely because defendants were required to file any affidavits in support of their motion with the original motion itself. *See* Fed. R. Civ. P. 6(d). Defendants respond that the court should exercise its discretion to accept the late affidavit as the affidavit responds to issues raised by the plaintiffs for the first time in

plaintiffs' response brief. *See Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993) (district court has discretion to consider a late affidavit if cause or excusable neglect has been shown by the party submitting the late affidavit). The court finds that defendants have shown cause as to why the court should accept this affidavit. Therefore, plaintiffs' motion to strike will be denied and defendants' motion for leave to file the affidavit will be allowed.

IV. MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment is appropriate in cases where there is no genuine dispute as to a material fact, and in which it appears that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993). Summary judgment should be granted in those cases "in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law." *Id.* In making this determination, the court draws all permissible inferences from the underlying facts in the light most favorable to the party opposing the motion. "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

Appendix B

B.- Collateral Estoppel

In their motions for summary judgment, defendants initially assert that plaintiffs are collaterally estopped from raising the probable cause issue, the issue central to plaintiffs' claims, because probable cause was conclusively established at the probable cause hearing conducted in September 1996. Defendants also contend that probable cause was further established when a grand jury returned a true bill of indictment against Isidro. Plaintiffs respond that under North Carolina law of collateral estoppel and the statutory procedures for probable cause hearings, plaintiffs have not had a full and fair opportunity to litigate this issue, especially given that in North Carolina a probable cause determination is an unappealable interlocutory order. Therefore, plaintiffs maintain that they are not estopped from litigating the existence of probable cause in this litigation. The court agrees with plaintiffs and for the reasons stated in plaintiffs' response brief, the court concludes that plaintiffs are not collaterally estopped from litigating the issue of probable cause in this action.

C. Atkins' Immunity from Suit

Before turning to defendants' arguments on the merits of plaintiffs' claims, the court must first address defendant Atkins' argument that he is entitled to federal qualified immunity on the §1983 claims against him and entitled to state law immunity on the state law claims asserted.

Appendix B

1. Federal Qualified Immunity Standard

Qualified immunity protects government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether an officer is entitled to qualified immunity, the court " 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,' " before " 'proceed[ing] to determine whether that right was clearly established at the time of the alleged violation.' " *See Wilson y. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)). The nature of the right allegedly violated must be defined "at a *high* level of particularity." *Rogers v. Pendleton*, 249 F.3d 279, 286 (4th Cir. 2001) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 250-51 (4th Cir. 1999)).

2. Federal Qualified Immunity of Defendant Atkins

Defendant Atkins asserts that he is entitled to qualified immunity against plaintiffs' claims because there was probable cause to arrest Isidro for the murder of Rickie Jean. However, for the purpose of a qualified immunity analysis, the Fourth Circuit Court of Appeals has stated that "the absence of probable cause is not determinative. Rather, where a law enforcement officer acts pursuant to a warrant; the critical question is whether the officer could have reasonably thought there was probable cause to seek the warrant." *Wadkins v. Arnold*, 214 F.3d 535, 539 (4th Cir. 2000). "Only

where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (citation omitted). The Supreme Court has further observed:

> [I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable.

Anderson v. Creighton, 483 U.S. 635, 641, (1987) (citing *Malley*, 475 U.S. at 344-45). Therefore, an officer may be entitled to qualified immunity even if the warrant at issue is later determined to have been lacking in probable cause. *Wadkins*, 214 F.3d at 539.

For the purpose of the court's analysis of the reasonableness of an officer's belief that probable cause existed, the Fourth Circuit has noted that "the legal principles relating to the probable cause standard provide a convenient starting point." *Id.* Probable cause exists when the facts and circumstances within an officer's knowledge—or of which he possesses reasonably trustworthy information—are sufficient in themselves to convince a person of reasonable caution that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citation omitted). In assessing whether probable cause exists, a court must examine the totality of the circumstances. *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996). Determining whether the

information surrounding an arrest suffices to establish probable cause is an individualized and fact-specific inquiry. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Consequently, the court will examine the totality of the evidence available to Atkins at the time he sought a warrant for the arrest of Isidro Gomez to determine if a reasonable officer could have believed that probable cause existed.

In his motion for summary judgment, defendant Atkins contends that there is "an abundance of evidence" that points to Isidro as Rickie Jean's murderer. (Def. Atkins' Br. in Support of Summ. J. at 16.) In support of his argument, Atkins directs this court time and time again to the Statement of Investigating Officer in Detail (AP851-856) which lists all of the evidence from which Atkins drew his conclusion about probable cause. This document also represents the evidence that he presented to his superiors and Attorney Koenig in their meeting, and to the magistrate who issued the arrest warrant.

However, the question of whether this compilation of evidence, taken as is, supports a reasonable belief that probable cause existed, is irrelevant to the plaintiffs' argument. Plaintiffs' claim is premised upon the allegation that this critical summary of evidence compiled and relied upon by Atkins and others contains material falsities, inaccuracies, misleading statements, and omissions. The entire basis of plaintiffs' action is that when these falsities and omissions are corrected and the evidence viewed more completely and accurately, no reasonable officer could have believed that Isidro committed, or even had an opportunity to commit, the murder of Rickie Jean Gomez.

Appendix B

The court's analysis begins with the information compiled by Atkins for the purpose of seeking a warrant against Isidro. The thrust of plaintiffs' argument is that the totality of the evidence demonstrates that Isidro was not and could not have been in Fayetteville at the most obvious time of Ricki Jean's murder. The evidence cited by Atkins that would connect Isidro to the murder include the following:[5]

> 1) "At the time of the autopsy of the Victim, the Defendant's [Isidro's] body hairs were found on the body of the victim. SBI laboratory tests indicate the recovered body hairs are consistent with the body hairs of the Defendant." (Statement of Investigating Officer in Detail ¶ 1 — AP851.)
>
> "On 15 July, 1980 a crime scene search by ID Bureau Technicians disclosed some body hairs on the bed coverings that were in the Victim's car along with her body. And the testing of the body hairs found on the bedclothes by the SBI Laboratory indicated that the body hairs were consistent with the body hairs of the Defendant." (*Id.* ¶ 36 — AP855.)

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5. Many of the statements made by Atkins are general statements about the crime and the state of the crime scene and, as such, are neutral as it relates to the identity of the murderer. Other statements relate to a possible motive for Isidro to have murdered Rickie Jean. However, for the purpose of the court's analysis, the court has focused on those statements which would suggest that Isidro either had the opportunity to commit the crime or was physically present at the scene when it was committed.

2) "The SBI laboratory tested the blood residue [found at the crime scene] and indicated that the blood type was type 'A'. The blood type of the Defendant is type 'A.' Testing of the blood of the Defendant by the SBI laboratory indicated that the blood found under the fingernails of the Victim [was] consistent with the blood type of the Defendant." (*Id.* ¶ 2.)

3) "On 14 July, 1980 the crime scene search by ID Bureau Technicians disclosed footprints in blood in the driveway of the Gomez home. Comparison of the size of the shoe print in blood indicated a possible size '7'. The Defendant's shoe size by his own statement is '7' to '7½' depending upon what type of shoe." (Id. ¶ 4.)

4) "On 14 July, 1980 the crime scene search by ID Bureau Technicians disclosed a wet washcloth on the edge of the bathtub in the master bath with what appeared to be blood on it. The blood was diluted from having been washed out." (*Id.* ¶ 27 — AP854.)

5) "On 14 July, 1980 while the Defendant has stated several times that he arrived in Fayetteville, N.C. at 1800 hours, there are witnesses who have stated that they spoke personally with Isidore [sic] Gomez by telephone as early as 1500 hours this same day and at least 3 hours prior to him stating that he arrived at 1800 hours." (*Id.* ¶ 32.)

6) An SBI agent and a Sheriff's Detective drove the route Isidro had taken from Georgia to Fayetteville in four and a half to five hours with one stop for gas and food. (*Id.* ¶ 33.)

7) The location of the stab wounds on the victim indicated that the suspect was right-handed, and the Defendant is right-handed. (*Id.* ¶¶ 40, 41.)

8) The Defendant took and failed a polygraph test.[6] (*Id.* ¶ 50 — AP856.)

While the above evidence proffered by Atkins would give rise to at least arguable probable cause that Isidro had committed the murder, when the evidence is adjusted for material misstatements, inaccuracies and omissions, probable cause deteriorates significantly. First, plaintiffs assert that Atkins' statement that "the Defendant's body hairs were found on the body of the victim," (*Id.* at ¶ 1), is, at minimum, misleading because the 1980 SBI report found only that the hairs were "microscopically consistent." (State Bureau of Investigation Laboratory Report — AP885-886.) Furthermore, the plaintiffs assert that any reasonable homicide investigator in 1996 should have known that such a test could only

6. While plaintiffs do not dispute the accuracy of this statement, they do challenge the validity of the polygraph test to which Isidro voluntarily submitted. Plaintiffs assert that it was administered only three days after the discovery of Rickie Jean's body, that Isidro warned the agent conducting the test that he would likely give an emotional response and that the agent administering the test was biased because he was the agent assigned to the case and was attempting to build a case against Isidro. (I. Gomez Aff. ¶ 44 - AP4799.)

indicate whether the hair was human, from what part of the body it originated, the person's race, and in some cases, the age of the individual, depending on the graying of the hair, but could not determine the individual to whom the hair belonged. (Tucker Aff. ¶ 12 — AP4835.)

Next, while they do not dispute the statement that Isidro's blood type, type "A," was found under Rickie Jean's fingernails in 1980, plaintiffs assert that Atkins failed to further disclose that the DNA analysis of the fingernails completed on 29 April 1996, prior to seeking the warrant, did not detect the presence of Isidro's DNA. (29 April 1996 Laboratory Report — AP1872.) Plaintiffs also point out that despite the fact that Isidro's blood type was found at the scene, blood typing, as with microscopic hair analysis, yields only class evidence as opposed to individualized evidence. (Tucker Aff. ¶ 12 — AP4835.)

As for Atkins' statement that the size "7" bloody shoe prints found in the driveway were the same size as Isidro's, an unquestionably critical piece of evidence, Atkins own notes indicate that Isidro told Atkins that his shoe size was "11" to "11½" (I. Gomez Aff. ¶ 50 and Exhibit E attached thereto — AP4801, AP4821-4826.) Obviously, this evidence is a strong indication that someone other than Isidro committed the murder.

As for Atkins statement that a bloody washcloth was found in the bathroom where Isidro had reportedly taken a shower after arriving home, a 1980 laboratory test detected no blood on the washcloth. (State Bureau of Investigation Laboratory Report — AP880.)

Next, Atkins reports that *witnesses* stated that they personally spoke to Isidro as early as 3:00 p.m. despite Isidro's statement that he arrived back in Fayetteville around 6:00 p.m. (Statement of Investigating Officer in Detail ¶ 32 — AP854.) In fact, there was only one witness that stated that he had spoken to Isidro on the phone that afternoon. This witness was David Rogers, Rickie Jean's supervisor at Piedmont. In his 1980 interview, Rogers told investigators that he spoke to Isidro at 6:20 p.m., which is consistent with Isidro's recollection. (1980 Rogers Interview Notes — AP1058; I. Gomez Aff. ¶ 32 — AP4796.) In 1996, sixteen years later, Rogers told Atkins that he "believed" that it was around 3:00 p.m. when he spoke to Isidro. (1996 Rogers Interview Notes - AP 1053.) However, Rogers also stated that "his recall of the events in July, 1980 and what he said in his interviews then with the original Detectives might be differant [sic], but what he had told the Detectives in July, 1980 would be the facts and the truth as he knew it then and that [t]he notes written by the Detectives in 1980 would be the facts as he told it to them." (*Id.* at AP1054.)

Plaintiffs next contend that the four and a half to five hour estimate of the drive time from Atlanta to Fayetteville reported by the investigating officers was facially incredible. Plaintiffs assert that a simple calculation reveals that to drive the 376 miles total distance, with a twenty minute stop for gas and food,[7] would require an average speed of approximately 85 to 90 miles per hour for the entire duration of the trip. Nevertheless, Atkins states that the officers did not exceed the speed limit. The speed limit on the interstates

7. This is the court's own estimate for the time it would have taken the two officers to stop.

Isidro used in 1980 was 55 miles per hour. Isidro reported an approximate 7 and one-half hour trip time. Based on this trip time and also allowing for a twenty minute stop, Isidro's average speed would have been about 53 miles per hour.

Plaintiffs contend not only that the above information was false and misleading, they additionally assert that material exculpatory information was not disclosed. First, Atkins failed to disclose that the prints lifted from Rickie Jean's car did not match Isidro's. (State Bureau of Investigation Laboratory Report — AP881-882.) Atkins also did not disclose that: 1) Riekie Jean failed to show up for work at 6:30 a.m. on Monday 14 July 1980, though this was the sole reason for her return to Fayetteville on Sunday evening, (I. Gomez Aff. ¶ 21 — AP4793.); 2) she was found still wearing her nightgown, (City-County Bureau of Identification Call Record — AP874.); and 3) she never called in to work to explain her failure to show up for work despite the fact that, prior to that time, she had never even been late for work. (1980 Rogers Interview Notes — AP 1055; Fermanides Interview Notes - AP 1062.) All of this omitted evidence supports a strong inference that Rickie Jean was murdered before Isidro had even departed Atlanta on Monday morning.

In light of the above, the court concludes that when Atkins' statement of the evidence is corrected for misleading, false and omitted evidence, all that remains is a practically unrefuted alibi, no physical connection of Isidro to the crime with the exception of broad class evidence, circumstances that strongly suggest that Rickie Jean was murdered long before Isidro left Atlanta, and evidence that undeniably suggests that someone *other* than Isidro was the murderer

(i.e., size "7" footprints). In sum, having thoroughly reviewed the totality of evidence available to Atkins at the time he sought the arrest warrant, the court concludes that the evidence does not support a finding of probable cause. The court further concludes that a reasonable officer could not have believed that there was probable cause to seek an arrest warrant under the circumstances. *See Wadkins*, 214 F.3d at 539.[8]

Finally, having found that plaintiffs have alleged the violation of a constitutional right, the court must next address whether that right was clearly established at the time of the alleged violation. *See Wilson*, 526 U.S. at 609. However, defendant Atkins has conceded, and the court agrees, that the right to be free from arrest without probable cause was clearly established at the time of Isidro's arrest. *See Wadkins*, 214 F.3d at 538 (adopting the reasoning of *Wadkins v. Arnold*, No. 97-0151-A, mem. op. at 12-13 (W.D. Va. Feb. 19, 1999)). Therefore, as plaintiffs have sufficiently alleged that Atkins has violated a clearly established constitutional right, the court concludes that Atkins is not entitled to federal qualified immunity. Consequently, defendant Atkins' motion for summary judgment on the ground of federal qualified immunity will be denied.

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8. In support of his argument that he had a reasonable belief that probable cause existed, Atkins attempts to rely upon the determination that probable cause exists by both a neutral and detached magistrate as well as by the Sheriff's Department attorney and his supervisors. However, as the court concludes that the information presented by Atkins was false, misleading and incomplete, he is not entitled to rely on these independent evaluations.

Appendix B

3. State Immunity of *Defendant Atkins*

Defendant Atkins also contends that he is entitled to immunity on the state law claims asserted against him. In North Carolina; a public officer, sued in his individual capacity, is immune from liability for his negligence, so long as his conduct cannot fairly be characterized as "corrupt or malicious." *Murray v. Justice*, 96 N.C. App. 169, 176 (1989). Plaintiffs assert that North Carolina Courts have long held that malice may be inferred from a lack of probable cause. *See id.* at 173 ("Malice, as required in malicious prosecution actions, may be inferred from a lack of probable cause when instituting the underlying action."); *see also Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 254 (1987) (citing *Taylor v. Hodge*, 229 N.C. 558, 560 (1948)). The court has concluded above that plaintiffs have sufficiently shown a lack of probable cause for Isidro's arrest. As a lack of probable cause gives rise to a inference of malice, the court concludes that Atkins is not entitled to public officer immunity on the state law claims. Consequently, defendant Atkins' motion for summary judgment on this ground will be denied.

Outside of his immunity arguments, Atkins asserts that he is entitled to summary judgment because there was, as a matter of law, probable cause for Isidro's arrest. For the reasons state *supra*, summary judgment on this ground will also be denied.

D. § 1983 Claim Against Defendant Butler in His Official Capacity

The court next addresses defendant Butler's motion to dismiss the § 1983 claim brought against him in his official capacity. As pointed out by defendant, a suit against an official in his official capacity is equivalent to suing the entity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Thus, the claims brought by plaintiffs against Butler in his official capacity are claims against the Cumberland County Sheriff's Department ("CCSD").[9]

In its motion, CCSD asserts that plaintiffs have failed to establish a claim of entity liability under § 1983 pursuant to the framework set out in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Under *Monell*, local governments are not liable under § 1983 under a theory of respondeat superior. *Id.* at 694. Rather, entity liability may result only where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or where "constitutional deprivations [are] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91. There must be a "direct causal link between

9. For this reason, the court will refer to the defendant as CCSD in its discussion of the motion for summary judgment by defendant Butler in his official capacity.

a municipal policy or custom and the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Where a plaintiff claims that the entity caused a violation of his constitutional rights by failing to implement a policy, including a policy of adequate training, the plaintiff must show that such a failure was the direct result of "deliberate indifference" to the rights of the plaintiff. *Id.* at 388.

Defendant CCSD contends that plaintiffs have failed to forecast any evidence that the failure of CCSD to have a policy regarding the investigation of "cold cases" caused a violation of Isidro's constitutional rights. The court agrees. There is no indication that, nor can the court imagine how, any policy on "cold" cases would have prevented Atkins from allegedly arresting Isidro without probable cause. Plaintiffs have failed to demonstrate how the probable cause standard is different for "cold" cases than for more current cases. As defendant Butler has aptly put it, "Probable cause is probable cause, regardless of the age of the case or the evidence." (Def. Butler's Br. in Support of Summ. J. at 11.) Therefore, even assuming that CCSD should have instituted some type of policy or procedure for the reopening and further investigation of "cold cases," plaintiffs have failed to show how such a policy would have prevented the particular violation alleged in this case. Therefore, the court concludes that defendant CCSD is entitled to summary judgment on plaintiffs' § 1983 claim to the extent that it is based on the lack of a "cold" case policy.

Nevertheless, a reading of the amended complaint reveals that plaintiffs' § 1983 claim against CCSD was not based solely on any "cold case" policy but rather with respect to

"official policies, practices, customs and procedures of the Sheriff's Department, including but *not limited to* the investigation of long-unsolved crimes by the 'cold case' squad. . . ."[10] (Am. Compl. ¶ 154(b) (emphasis added)). Defendant CCSD has not made an argument that it is entitled to summary judgment on the § 1983 claim relating to any policy other than a "cold case" policy. Furthermore, even had CCSD made such an argument, upon full review of the materials filed with the response and reply to the motion for summary judgment, the court finds there to be genuine issues of material fact as to this claim and defendant CCSD is not entitled to summary judgment as a matter of law.

E. State Law Claims Against Sheriff's Department

As for the remaining state law claims brought by plaintiffs against CCSD, defendant Butler has made brief arguments as to why he is entitled to summary judgment on the civil conspiracy and abuse of process claims in his individual capacity, which, as noted previously, have been dismissed. However, he has made no argument as to why CCSD is entitled to summary judgment based on Atkins' actions under a theory of respondeat superior. Therefore, the state law claims against the CCSD remain for adjudication.

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10. The court disagrees with defendant's assertion that plaintiffs have not alleged a § 1983 claim for inadequate training because the word "training" is not used in the complaint. Inadequate training claims have been allowed by the U.S. Supreme Court on the basis that "the failure to provide proper training may fairly be said to represent a *policy* for which the city is responsible . . . ." *Canton*, 489 U.S. at 390 (emphasis added). Thus, the court concludes that the term "policy" in the plaintiffs' complaint is sufficient to raise a claim for deficient "training."

Appendix B

V. CONCLUSION

For the foregoing reasons, plaintiffs' motion to strike the affidavit of Cuyler L. Windham is DENIED and defendants' motion for leave to file the affidavit is ALLOWED. Defendant Atkins' motion for summary judgment is also DENIED. The motion for summary judgment filed by defendant Sheriff Butler in his official capacity is ALLOWED IN PART and DENIED IN PART; specifically, summary judgment is ALLOWED only with respect to the § 1983 claim as it relates to a "cold case" policy.

This 27 August 2001.

s/ W. Earl Britt
W. EARL BRITT
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED AUGUST 5, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED August 5, 2002

No. 01-2112
CA-99-611-5-BR

ISIDRO GOMEZ; LINDA L. GOMEZ, Wife

Plaintiffs - Appellees

v.

W.J. ATKINS, in his official and individual capacity,

Defendant - Appellant

and

EARL MOOSE BUTLER, Sheriff of Cumberland County, in his official and individual capacity; H.R. COLLINS, in his official and individual capacity; JERRY D. WEBSTER, in his individual capacity; WESTERN SURETY COMPANY; DEBRA KOENIG,

Defendants

On Petition for Rehearing and Rehearing En Banc

Appendix C

The appellees petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK